United States Court of Appeals

for the Second Circuit

APPENDIX

76-6116

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

B

GASTON BRIONES and CECILIA BRIONES,

Appellants,

P/S

-against-

MAURICE F. KILEY, District Director for the New York District, Immigration and Naturalization Service, United States Department of Justice,

Appellee.

On Appeal from the United States District Court for the Southern District of New York.

UNITED STATES COURT OF APPEALS
FILED
SEP 15 1976
DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX FOR APPELLANTS

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PLAINTIFFS

BRIONES, GASTON
BRIONES, CECILIA

DEFENDANTS Tenney, J.

KILEY, MAURICE F. District Director for the N.Y. Dist, I.N.S., U.S. Dept. of Justice.

CAUSE

5 U.S.C. 701-706 action for a declaratory judgment to review a denial of a stay of voluntary departure. rg

ATTORNEYS

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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UNITED STATES DISTRICT COURT DOCKET

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Judge Tenney Gaston Briones,et ano. -vs- Maurice F. Kiley, etc.

DATE	NR.	PROCEEDINGS
03-10-76	1	Filed complaint and issued summons.
03-12-76	2	Filed Pltffs affdvt&Order to show cause with stay of deporaation provision ret. 3/19/76.,10:00 A.M.
03-19-76	3	Filed Stip&Order that hearing on pltffs'motion for preliminary injunction adjourned from 3/19/76 to 3/31/76.Tenney,J
-3-30-76	4	Filed Affdvt by Mary P.Maguire for deft in opposition to motion for Preliminary Injunction.
03-23-76	5	Filed Summons with Marshal's Return.Served Maurice F.Kiley personally,3/17/76 & Atty Gen.Wash.D.C.by Certified Mail#285739.on 3/17/76
06-29-76	(6)	Filed Memorandum Opinion #44678: Pltff's motion for a preliminary injunction is denied. So ordered. Tenney,J. m/n
07-14-76	(7)	Filed Pltffs'Suppl.Memorandum of Law. (rcvd this date)
07-14-76	(8)	Filed " Memorandum of Law " " "
07-20-76	(9)	Filed Pltff's Notice of Appeal from order denying pltffs'motion for preliminary injunction entered on 6/29/76(mailed copy to AUSA Wallenstein,US Courthouse Annex, on 7/30/76)

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MEMORANDUM DECISION AND ORDER OF JUDGE TENNEY
DATED JUNE 29, 1976

Copy

U.S. DISTRICT COURT FILED JUN 29 1976 S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GASTON BRIONES and CECILIA BRIONES,

Plaintiffs,

-against-

MAURICE F. KILEY, District Director for the New York District, Immigration and Naturalization Service, United States Department of Justice,

Defendant.

76 Civ. 1147 (CHT)

#44678

MEMORANDUM

TENNEY, J.

Plaintiffs Cecilia and Gaston Briones seek an order of this Court granting a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. For the reasons set forth below, the motion is denied.

Facts

Plaintiffs are both natives and citizens of Chile. Plaintiff Gaston Briones entered the United States on September 27, 1969, as a nonimmigrant visitor for pleasure with an authorized stay until November 27, 1969. Mr. Briones stayed beyond this date and was ordered to appear at the office of the Immigration and Naturalization Service ("the Service"), but changed his employment and absconded. Plaintiff Cecilia Briones entered this country on January 31, 1970, with an authorized stay

until June 30, 1970. She sought and obtained an extension of her departure date until December 30, 1970. In the interim, on March 20, 1970, plaintiffs were married. Mrs. Briones also stayed beyond her authorized departure date.

On February 26, 1971, plaintiffs submitted a request for political asylum to the New York District Office of the Service. This request was denied on February 28, 1972, and plaintiffs were given the privilege of voluntary departure, which they declined. Deportation proceedings were instituted on February 28, 1972, against both plaintiffs and a hearing was held on May 3, 1972. Plaintiffs, represented by counsel at the hearing, conceded their deportability and requested voluntary departure. The privilege of voluntary departure was granted until September 3, 1972, with the proviso that if plaintiffs failed to depart voluntarily they would be deported to Spain, or in the alternative to Chile. The plaintiffs waived appeal and the orders became final.

On September 1, 1972, plaintiffs sought an extention of their voluntary departure date to December 3, 1972, based on the need of Mrs. Briones' employer for her services, but this request was denied on September 5, 1972. Notwithstanding the denial, plaintiffs' counsel was advised at that time that if plaintiffs presented confirmed departure tickets for on or before September 20, they could preserve their privilege of voluntary departure. Plaintiffs did not so depart and on

November 6, 1972, warrants of deportation were issued and plaintiffs were advised of their imminent deportation.

On December 8, 1972, plaintiffs sought to stay the orders of deportation based on the fact that Mrs. Briones was then pregnant. This request was granted and the orders of deportation were stayed until January 11, 1973. Plaintiffs were also advised that if they were prepared to depart by that date, then consideration would be given to a request for restoration of voluntary departure. On January 10, 1973, plaintiffs submitted a further request for a one month extension of the stay of deportation. There is no record of the disposition of this request. In the interim, however, Mrs. Briones received a Department of Labor certification, necessary in order to obtain a visa, and both plaintiffs obtained a priority date of October 10, 1972, on the Western Hemisphere visa waiting list. Then, on June 4, 1973, Mrs. Briones gave birth to a daughter who is a United States citizen.

Plaintiffs next submitted a motion, on September 21, 1973, to reopen their deportation proceedings and to stay deportation to allow them to present a claim based on their fear of persecution if forced to return to Chile. The matter was referred to the State Department by the Service for comment. The State Department advised against the grant of the claim and the Service concurred. The plaintiffs were so advised on April

24, 1974. On May 6, 1974, the decision of the Immigration Judge was rendered denying the plaintiffs' motion to reopen, but once again granting the privilege of voluntary departure to May 20, 1974. Plaintiffs failed to depart by May 20. Rather, in the intervening period, on May 14, plaintiffs' counsel filed a request for an extension of the departure date, but the request was denied and by notice dated June 18, 1974, plaintiffs were ordered to surrender for deportation on July 8, 1974.

On July 8, 1974, plaintiffs filed an action in this Court. The action was dismissed by stipulation since the issues raised therein were the same as an action already pending in this Court entitled Noel v. Green, namely, whether aliens (similarly situated to these plaintiffs) should be permitted to remain in the United States until their priority date for visa issuance became current. The Noel action had been commenced in this Court on August 24, 1973. On February 8, 1974, a preliminary injunction application was denied in the Noel case and an appeal was filed. The denial of the preliminary injunction was affirmed by the United States Court of Appeals for the Second Circuit on January 4, 1975, and certiorari was denied by the United States Supreme Court on October 6, 1975. It had been the understanding of both the plaintiffs and the Service that they would be bound by the outcome in the Noel

litigation. Deportation had been stayed pending the conclusion of the Noel litigation.

During the pendency of the petition for certiorari in the Noel litigation, plaintiffs were notified that they had been scheduled for a visa appointment in Santiago, Chile. At this point the plaintiffs were in something of a bind. On the one hand they no longer had the privilege of voluntary departure available to them. On the other hand, if they left under an order of deportation, they would be denied visas as excludable aliens unless they first secured the express permission of the Attorney General of the United States to return. As a result of this situation, plaintiffs, on April 7, 1975, sought a restoration of voluntary departure. This request was initially denied by the District Director of the Service and was referred to an Immigration Judge for a hearing. The hearing took place on April 18, and on April 21, 1975, the motion to reopen was denied. An appeal was taken to the Board of Immigration Appeals, but was dismissed. No further appeal was taken.

Subsequent to the denial of certiorari in Noel, plaintiffs were notified to surrender for deportation on February 10, 1976. On February 4, 1976, plaintiffs filed an application for a thirty day stay of deportation and once again requested a reinstatement of the privilege of voluntary departure. The stay was granted, but the reinstatement was denied. This action

followed on March 10, 1976 seeking a declaratory judgment that the District Director of the Service had abused his discretion (or failed to exercise it) in denying the plaintiffs' application for a restoration of the privilege of voluntary departure. On that date a temporary restraining order was entered restraining defendant from taking the plaintiffs into custody or deporting them pending the determination of their motion for a preliminary injunction.

Preliminary Injunction

A preliminary injunction has repeatedly been recognized in this circuit as an extraordinary remedy. See Gulf & Western Industries, Inc. v. The Great Atlantic and Pacific Tea Company, Inc., 476 F.2d 687, 692 (2d Cir. 1973); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir.), cert. denied, 394 U.S. 899 (1969). Application for this remedy is addressed to the discretion of the district court. Yakus v. United States, 321 U.S. 414, 440 (1944); 7 Moore's Federal Practice ¶ 65.04[2].

The standard for issuance of a preliminary injunction was enunciated by the Second Circuit as follows:

> "The standard factors which the court now considers upon an application for a preliminary injunction are well known: (1) clear likelihood of success on the law and the facts then available and possible irreparable injury, or (2) sufficiently serious questions on the merits making them fair ground for litigation and a balance of the equities tipping decidedly in

favor of preliminary relief." Columbia Pictures Industries, Inc. v. American Broadcasting Companies, Inc., 501 F.2d 854, 857 (2d Cir. 1974).

See also San Filippo v. United Brotherhood of Carpenters and Joiners of America, No. 75-7394, at 6392-93 (2d Cir., Oct. 28, 1975); Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973); Gulf & Western Industries, Inc. v. The Great Atlantic and Pacific Tea Company, supra, 476 F.2d at 692-93; Dino De Laurentiis Cinematografica, S.p.A. v. D-150, Inc., 366 F.2d 373, 375 (2d Cir. 1966).

Thus, the issue before the Court is whether the plaintiffs have met their burden of showing either satisfaction of the "clear likelihood" test or the "serious questions" test. This, of course, begs the question of whether the defendant District Director abused his discretion in denying the plaintiffs' request for reinstatement of voluntary departure.

Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. § 1254(e) provides in pertinent part with regard to voluntary departure:

> "The Attorney General may, in his discretion, permit any alien under deportation proceedings ... to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection."

The regulations promulgated pursuant to statute allow the

District Director to extend or reinstate the privilege. 8 C.F.R. § 244.2.

The District Director's denial is subject to the test of abuse of discretion, Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975), and the scope of review in this Court is extremely narrow. Muskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969). In reviewing a discretionary decision, the Court would only find an abuse if it were to find that the decision "were made without a ration explanation, [or that it] inexplicably departed from established policies, or rested on an impermissible basis...." Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715, 719 (2d Cir. 1966). A permissible basis for the decision is the absence of good faith or the use of dilatory tactics on the part of the alien. Lam Tat Sin v. Esperdy, 227 F. Supp. 482 (S.D.N.Y.), aff'd, 334 F.2d 999 (2d Cir.), cert. denied, 379 U.S. 901 (1964). See also Bolanos v. Kiley, supra, 509 F.2d at 1026.

Defendant, in opposing the application for a preliminary injunction, has stated that "[t]he purposeful pattern found in all of plaintiffs' applications and motions may be summed up in one word--delay." (Affidavit of Mary P. Maguire, sworn to March 30, 1976, at ¶ 20). With this conclusion, the Court must agree. While the plaintiffs attempt to justify their defalcations (and an individual link in the chain here and there may be justified adequately) the overall picture is of a tenacious

attempt to remain in this country through the use of every inventive tactic available. The District Director denied the reinstatement of voluntary departure to plaintiffs because they had not availed themselves of the privilege when it had been granted on two occasions previously. It is the conclusion of this Court, based on the detailed recitation of the facts herein and the law stated above, that there was no abuse of discretion. Having reached this conclusion, the Court finds that the plaintiffs have failed to meet their burden of showing either a clear likelihood of success or that they have raised serious questions going to the merits.

Accordingly, the plaintiffs' motion for a preliminary injunction is denied.

So ordered.

Dated: New York, New York
June 29, 1976

CHARLES H. TENNEY

U.S.D.J.

GOVERNMENT AFFIDAVIT IN OPPOSITION TO A MOTION FOR A PRELIMINARY INJUNCTION DATED MARCH 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GASTON BRIONES and CECILIA BRIONES, Plaintiffs, -against- MAURICE F. KILEY, DISTRICT DIRECTOR FOR THE NEW YORK DISTRICT, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION 76 Civ. 1147 (CHT)

STATE OF NEW YORK :
SS.:
COUNTY OF NEW YORK :

MARY P. MAGUIRE, being duly sworn, deposes and says:

1. I am a Special Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and I am in charge of this case. I make this affidavit in opposition to the plaintiffs motion for a preliminary injunction. This affidavit is based on the administrative files of the Immigration and Naturalization Service (the "Service") relating to the plaintiffs, the pertinent portions of which are incorporated herein as exhibits.

2. Plaintiff Gaston Briones ("Briones") is a 30 year old alien, a native and citizen of Chile. He entered the United States on September 27, 1969 as a

nonimmigrant visitor for pleasure and was authorized to remain in the United States until November 27, 1969. A short time after the expiration of his authorized stay Briones was located at his place of employment by immigration officers and was given a pass directing him to appear at the Service office. Instead of doing so, nowever, Briones changed his employment and absconded.

3. Plaintiff Cecilia Briones ("Mrs. Briones") is 29 year old alien, also a native and citizen of Chile. She is the wife of plaintiff Gaston Briones. Mrs. Briones entered the United States on January 31, 1970 as a nonimmigrant visitor for pleasure and was authorized to remain in the United States until June 30, 1970. She sought and received one extension of her authorized stay to December 30, 1970. On March 20, 1970 plaintiffs were married at New York City

4. On February 26, 1971 plaintiffs appeared at the New York District Office of the Service and stated that they wished to seek political asylum. On February 28, 1972 the plaintiffs were advised that their request for political asylum had been denied and they were asked if they were willing to voluntarily depart from the United States in thirty (30) days. Their reply was in the negative and they were advised that deportation proceedings would be instituted.

5. Deportation proceedings were instituted

against plaintiffs on February 28, 1972, (Exhibits 1-A and 1-B). A deportation hearing was held on May 3, 1972. At that time the plaintiffs, who were represented by Counsel, conceded their deportability and requested the privilege of voluntary departure pursuant to Section 244(e) of the Immigration and Nationality Act, (the "Act"), 8 U.S.C. § 1254 (e). They also designated Spain as the country to which they wished to be deported. The Immigration Judge entered orders on May 3, 1972 granting plaintiffs the privilege of voluntary departure until September 3, 1972. He also entered Alternate orders of deportation to Spain or, in the alternative, to Chile, in the event the plaintiffs failed to voluntarily depart by the prescribed date. Since the plaintiffs waived appeal, the orders of the Immigration Judge became final on the date entered. 8 C.F.R. §243.1.

6. On September 1, 1972, only two days prior to the expiration of their period of voluntary departure, plaintiffs, by their attorney, requested " a first and final extension of such voluntary departure" to December 3, 1972. The request was based upon the need of Mrs. Briones' employers for her services during that two-month period (Exhibit 2). The request was denied on September 5, 1972 but the plaintiffs' attorney was advised that if he presented confirmed departure tickets for on or before September 20, 1972, the plaintiffs could preserve the privilege of voluntary departure. Plaintiffs failed to depart volunt

and on November 6, 1972, warrants of deportation were issued (Exhibits 3-A and 3-B) and plaintiffs were advised that the orders of deportation would be enforced (Exhibits 4-A and 4-B).

7. On December 8, 1972, plaintiffs, by their attorney, submitted applications for stays of deportation based on the physical condition of Mrs. Briones, who was then pregnant (Exhibit 5). By letter dated December 18, 1972, the Service advised plaintiffs that their applications had been granted and that their deportation would be stayed until January 11, 1973. They were advised that if they were prepared to depart by that date, consideration would be given to their request for restoration of the privilege of voluntary departure (Exhibit 6).

8. On January 10, 1973, plaintiffs, by their attorney, submitted a request for a one-month extension of the stay of deportation. The request was again based on the physical condition of Mrs. Briones. The plaintiffs' attorney took pains to stress that the plaintiffs intended to depart voluntarily from the United States at their own expense. Furthermore, the Department of Labor had granted Mrs. Briones a labor certification, which she required in order to obtain a visa, and the plaintiffs had obtained a priority date of October 10, 1972 on the Western Hemisphere visa waiting list (Exhibit 7).

9. On June 4, 1973, Mrs. Briones gave birth to a daughter who is a United States citizen.

10. On September 21, 1973, plaintiffs by their new attorney, submitted a motion to reopen their deportation proceedings and for a stay of deportation to permit them to apply for the benefits of Section 243(h) of the Act, 8 U.S.C. §1253(h), i.e., withholding of deportation based on fear of persecution in Chile. (Exhibit 8). Plaintiffs were examined by the Service with respect to their persecution claim and on December 4, 1973 the facts in their case were submitted to the Department of State, Office of Refugee and Migration Affairs. On March 21, 1974, the Department of State advised that it did not appear that plaintiffs had a valid political asylum claim (Exhibit 9). The Service concurred with the view of the Department of State and by letter dated April 24, 1974, the Service advised the plaintiffs that their request for political asylum had been denied and that their deportation would not be stayed by virtue of the motion to reopen which had been referred to the Immigration Judge (Exhibit 10). On April 25, 1974, the plaintiffs were again advised that the deportation orders would be enforced.

11. By decision dated May 6, 1974, the Immigration Judge denied plaintiffs' motion to reopen their deportation proceedings but again granted plaintiffs the privilege of voluntary departure for a period of two weeks from the date of the order. Specifically, he ordered that the outstanding order of deportation would be deemed lifted upon their departure from the United States on or before May 20, 19[illegible] (Exhibit 11). Again plaintiffs failed to exercise the privilege of voluntary departure.

12. On May 14, 1974 the law firm of [illegible]

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& Kramer filed a notice of appearance on behalf of plaintiffs and requested a further extension of the time granted plaintiffs to depart from the United States (Exhibit 12). The request was denied and by notices dated June 18, 1974 plaintiffs were directed to surrender for deportation on July 8, 1974.

13. On July 8, 1974, plaintiffs by their Attorney filed an action in this court raising the same issue which had been litigated in another action in this Court, Noel v. Green. The issue raised was whether aliens similarly situated as these plaintiffs should be permitted to remain in the United States in a voluntary departure status until their priority date for visa issuance became current. The Noel v. Green case had been commended in this Court on August 24, 1973 and on February 8, 1974, Judge Gagliardi of this Court entered an order denying a preliminary injunction in that case. On February 27, 1974, a notice of appeal to the Court of Appeals for the Second Circuit was filed by the plaintiffs in Noel v. Green. From the institution of the Noel case, the Noel plaintiff's were represented by Pollack and Kramer. Thus when the Briones filed a Noel type complaint on July 8, 1974, the date on which they were due to surrender for deportation, their attorneys had been litigating the Noel casefor almost one year and had, in fact, filed their brief on appeal on June 10, 1974. Upon the filing of the Noel type complaint by the Briones on July 8, 1974 the parties

to that action, the Briones and the Service, stipulated that the deportation of the Briones would be stayed pending the decision in the Noel appeal and that the Briones would be bound by the decision in the Noel case. The Noel case was decided adversely to the plaintiff by the Second Circuit on January 4, 1975 and on October 6, 1975 the Supreme Court denied a petition for certiorari.

14. While the petition for certiorari in Noel was pending, the Briones were notified that a visa appointment had been scheduled for them at the American Embassy, Santiago, Chile. Since it was to their advantage plaintiffs were now ready and willing to leave the United States. However, if they left under an order of deportation, they would then be excludable from the United States under Section 212(a)(17) of the Act, 8 U.S.C. §1182(a)(17), and, therefore, would be denied a visa unless they secured the Attorney General's permission to reenter. Consequently, on April 7, 1975, plaintiffs, by their attorney, sought restoration of voluntary departure. Their request was denied by the defendant on that date and their motion for reinstatement of voluntary departure was referred to the Immigration Judge (Exhibit 13).

15. A hearing on the motion to reopen was held on April 18, 1975(see transcript attached hereto as Exhibit 14). In a decision dated April 21, 1975, the Immigration Ju

denied the motion to reopen (Exhibit 15). Plaintiff appealed that decision to the Board of Immigration Appeal which dismissed the appeal by a decision and order dated July 16, 1975 (Exhibit 16). Since the plaintiffs still enjoyed a court-oredered stay of deportation the Service was unable to enforce the deportation order. Plaintiffs did not seek to review the Board's order in the Court of Appeals pursuant to Section 106(a) of the Act, 8 U.S.C. §1105a(a).

16. Upon being advised that the Supreme Court had denied the petition for certiorari in the Noel case, the Service began to enforce the departure of all aliens who had been stipulated into the Noel case. Consequently, by notice dated January 28, 1976, plaintiffs were notified to surrender for deportation on February 10, 1976 (Exhibit 17). On February 4, 1976 plaintiffs, by their attorneys, filed an application for a 30 day stay of deportation so that Mr. Briones could sell a restaurant which he had purchased in March 1974 and also requested that voluntary departure be restored (Exhibit 18). The defendant granted the plaintiffs' request for a 30 day stay of deportation but denied the application for restoration of voluntary departure (Exhibit 19).

17. On March 10, 1976 plaintiffs instituted this declaratory judgment action in which they seek to review the defendant's denial of their application for restoration of voluntary departure. On that date this Court

issued an order directing the defendant to show cause why a preliminary injunction should not be issued to stay the deportation of the plaintiffs pending final disposition by this Court of the declaratory judgment action. The order of March 10, 1976 provided that the defendant is restrained from taking into custody or deporting the plaintiffs pending the hearing and determination of their motion for a preliminary injunction.

18. The Attorney General is authorized by Section 244(e) of the Act 8 U.S.C. §1254(e), to grant the privilege of voluntary departure to an otherwise deportable alien as a matter of discretion. The privilege is normally granted initially as it was in this case, by the Immigration Judge at the deportation hearing. The District Director may informally extend or reinstate it under 8 C.F.R. 244.2 or the alien may move to reopen the deportation proceedings to apply for reinstatement upon a showing of changed circumstances. The only statutory requirement for eligibility under this provision is that the alien establish that he is and has been a person of good moral character for at least five years immediately preceding his application. The Attorney General has set forth standards under 8 C.F.R. §244.1 under which an application for voluntary departure will be considered. This regulation provides that the Immigration Judge in his discretion may grant voluntary departure if the alien "establishes that he is willing and has the

immediate means with which to depart promptly from the United States.

19. The sole issue before this Court is whether the defendant abused his discretionary authority in denying plaintiffs' request for reinstatement of voluntary departure. The grant or denial of reinstatement of voluntary departure Vassiliou v. District Director, 461 F.2d 1193 (10th Cir. 1972). The scope of review by this Court is extremely narrow. Muskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969). Unless that decision is found to be without any rational explanation or to depart inexplicably from established practices so as to rest on an impermissible basis, this Court should not substitute its judgment for that of the District Director. Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975), Noel v. Chapman, 508 F.2d 1023 (2d Cir.1975), Wong Wing Hang v. I.N.S., 360 F.2d 715 (2d Cir. 1966). The absence of good faith and the use of dilatory tactics on the part of the alien are reasonable grounds for denial. Lam Tat Sin v. Esperdy, 277 F. Supp. 482 (S.D.N.Y.), aff'd, 334 F.2d 999 (2d Cir.), cert. denied, 379 U.S. 901 (1964). The burden of proving that an extension or reinstatement of voluntary departure should be granted is always on the alien. Roumeliotis v. I.N.S., 304 F.2d 453 (7th Cir. 1962), cert. denied, 371 U.S. 921 (1962).

20. The purposeful pattern found in all of

plaintiffs' applications and motions may be summed up in one word-delay. An alien who has not departed voluntarily within the initial period granted and who has engaged in dilatory tactics to delay deportation is not entitled to a reinstatement of voluntary departure. Fan Wan Keung v. I.N.S., 434 F.2d 301 (2d Cir. 1970).

21. Plaintiffs apparently contend that the defendant abused his discretion in denying their applications for reinstatement of voluntary departure because such denial penalized them for instituting a Noel - type action in this Court in July 1974. A review of the facts clearly establishes that the denial was not based on the delay caused by the litigation but rather on the record as a whole. The plaintiffs were given two opportunities to depart voluntarily. They chose not to do so. In fact, in March 1974 the male plaintiff, already under a deportation order, chose to invest money in a restaurant business. Their consistent course of action has been one of delay and one which evinces a total disregard of the immigration laws. For example, when the plaintiffs moved to reopen their deportation proceedings in April 1975, they were already the beneficiaries of a stay of deportation in connection with the litigation. Thus, they were still protected from deportation despite the denial of the motion to reopen.

22. There is one further fact which should be

noted by the Court. In the application for reinstatement of voluntary departure submitted on February 4, 1976 (Exhibit), plaintiffs attorney stated that "In conjunction with this motion all litigation re Noel in the Federal Court is hereby withdrawn." It is submitted that such statement was an attempt to misrepresent the status of the Federal Court litigation since the petition for a writ of certiorari had been denied on October 8, 1975.

23. Plaintiffs have failed to show that the District Director's denial of their request for reinstatement of voluntary departure was made without a rational explanation, that it inexplicably departed from established policy or rested on an impermissible basis. They have made no showing that an abuse of discretion occurred. After more than six years of illegal residence and employment these aliens should not be permitted to circumvent the immigration laws by dilatory tactics while other aliens lawfully await admission to the United States.

WHEREFORE, it is prayed that the motion for a preliminary injunction be denied in all respects, that the temporary restraining order be vacated and that the underlying complaint be dismissed.

Mary P. Maguire

MARY P. MAGUIRE
Special Assistant
United States Attorney

Sworn to before me this
30th day of March 1976

/s

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977

EXHIBIT 12 TO GOVERNMENT AFFIDAVIT A-24

Pollack & Kramer
Counselors at Law
26 Court Street
Brooklyn, N. Y. 11201

(212) 855-6650

CABLE ADDRESS "POLMARK"

MILTON DAN KRAMER
ARTHUR POLLACK

May 14, 1974

Immigration & Naturalization Service
20 West Broadway
New York, New York 10007

Attention: Deportation Section

Re: Gaston BRIONES
Cecilia DEGOLLADA DE BRIONES
A18 695 848 DB/SO
A19 457 561

Dear Sir or Madam:

Please be advised that our firm has been retained to represent the above-named client.

Enclosed herewith you will find form G-28.

It is respectfully requested that an extension of time in which to depart the United States be granted to the above-named clients on the basis that they are the parents of the United States citizen child.

An application for a permanent residence visa is presently pending at the American Consulate at Santiago, Chile. They have been assigned a priority date of October 10, 1972, with an approved labor certification.

Thank you for your cooperation in this matter.

Sincerely
POLLACK & KRAMER

5-15-74 *Arthur Pollack*
ARTHUR POLLACK

Encls:
AP/mpj

Advised Atty re status of case - 89.

PLAINTIFFS' AFFIDAVIT IN SUPPORT OF A MOTION FOR A PRELIMINARY INJUNCTION A-25

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

- x

GASTON BRIONES and
CECILIA BRIONES,

Plaintiffs,

-against-

AFFIDAVIT

MAURICE F. KILEY, District Director for the New York District, Immigration and Naturalization Service, United States Department of Justice,

76 Civ.

Defendant.

- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STANLEY H. WALLENSTEIN, being duly sworn, deposes and says:

1. I am an attorney and a member of the law firm of SCHIANO & WALLENSTEIN, ESQS., attorneys for the plaintiffs in this action. I make this affidavit in support of a motion for a preliminary injunction restraining the defendant, MAURICE F. KILEY, from deporting the plaintiffs, GASTON and CECILIA BRIONES, from the United States pending final determination by this Court of the declaratory judgment action on its merits.

2. This motion is made by Order to Show Cause instead of by Notice of Motion in order to request an interim stay of deportation pending determination of this motion. If no such interim stay of deportation is granted, the plaintiffs, GASTON and CECILIA BRIONES, will be immediately deported from the United States by the defendant, MAURICE F. KILEY, thereby making this motion and the declaratory judgment action moot.

3. The plaintiffs, GASTON and CECILIA BRIONES, are man and wife, both aliens and both natives and citizens of Chile. They entered the United States in September 1969 and January 1970, respectively, as visitors. They have lived in this country ever since that admission and they have overstayed their authorized visit. They have a United States citizen daughter, PAOLA, born in this country on June 4, 1973 (Exhibit A).

4. By virtue of a labor certification granted to CECILIA BRIONES, and by virtue of the fact that they have a United States citizen child, the BRIONES' are prima facie eligible to be issued permanent resident immigrant visas. Their visa applications were submitted several years ago to the United States Consulate in Chile. Their priority date under the Western Hemisphere quota is current and the Consul is ready to give them an appointment to formally apply for their visas. They are unable to apply, however, solely because the defendant director has refused to permit them to leave the country voluntarily and intends to deport them.

5. At a deportation hearing on May 3, 1972, the plaintiffs were granted voluntary departure to September 3, 1972. It was ordered that in the event they did not leave voluntarily, that they be deported to Spain, and alternatively to Chile if Spain refused to accept them.

6. The plaintiffs stayed beyond the time set for voluntary departure for the purpose of applying for political asylum. Although they were willing to depart voluntarily

to Spain, Spain had advised the defendant it would not permit the plaintiffs to enter. The plaintiffs however were fearful of then returning to Chile because of anticipated political persecution.

7. During April or May of 1974, the plaintiffs moved to reopen the deportation proceeding to permit them to apply for withholding of deportation to Chile because of anticipated persecution, pursuant to 8 U.S.C. § 1253(h). The motion was denied and it was ordered that voluntary departure be restored provided the plaintiffs depart by May 20, 1974.

8. During this time an action commenced as a class action was being litigated first in the United States District Court for the Southern District of New York, and then on appeal in the Second Circuit. The action, Noel v. Green, raised issues as to whether aliens similarly situated as these plaintiffs, should be permitted to remain in the United States in a voluntary departure status until their visa applications became current. The action, Noel v. Green, 73 Civ. 3682, had been commenced in the District Court on August 24, 1973. It was decided by the District Court on February 6, 1974, in an opinion denying the motion for a preliminary injunction. 376 F.Supp. 1095 (SDNY 1974). The decision was thereafter taken on appeal to the Second Circuit.

9. The plaintiffs remained beyond the date set for voluntary departure, and after receiving a notice to report for deportation on July 8, 1974, they filed an

action in the United States District Court for the Southern District of New York raising the same issues as in Noel v. Green. The appeal in Noel v. Green was then pending. After filing their action, it was dismissed by stipulation of the respective parties. The stipulation (Exhibit B) recognized that the facts and legal issues were similar and provided that the case would be governed by the final decision in Noel v. Green.

10. Noel v. Green was affirmed in the Second Circuit on January 3, 1975, Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975). Thereafter, on October 6, 1975, the Supreme Court denied certiorari finally ending the litigation. These plaintiffs then were ready and willing to leave under voluntary departure conditions.

11. Instead of permitting the plaintiffs to leave under voluntary departure, even though Noel v. Green was pending and in litigation at a time when these plaintiffs had voluntary departure, the defendant District Director sought to enforce deportation. On January 28, 1976, by letter to both plaintiffs, he ordered the plaintiffs to report for deportation to Chile on February 10, 1976 (Exhibit C and D).

12. Thereafter, on February 4, 1976, the plaintiffs, pursuant to the provisions of 8 CFR §§ 243.4 and 244.2, submitted to the defendant an application for a stay of deportation and for restoration of voluntary departure (Exhibit E). The reason set forth for requesting the stay of deportation was that the plaintiffs owned a restaurant,

which they would be required to sell, and they needed thirty days for that purpose. The reasons set forth for requesting restoration of voluntary departure were: a) that they have a United States citizen child, b) that they have a current immigration visa priority date, and most importantly, c) that they did not depart under the prior voluntary departure order because only by remaining here could they join in the litigation then in process in the Noel v. Green case.

12. The defendant District Director summarily disposed of the plaintiffs' application by his letter of February 12, 1976 (Exhibit F). He granted that part of the application requesting a stay of deportation by deferring deportation to March 10, 1976. He denied that portion of the application requesting restoration of voluntary departure. The reason set forth in support of the denial was that the plaintiffs had failed to leave voluntarily when they had that opportunity in the past.

13. The plaintiffs have a strong likelihood of success in this declaratory judgment action as they can show that the defendant abused his discretion in declining to restore voluntary departure. The reason set forth in support of the denial was that the plaintiffs had failed to depart voluntarily when they had the opportunity to do so earlier. That reason, however, in this situation, is not a permissible reason on which to base a denial of restoration of voluntary departure. Here the plaintiffs had a valid reason for not departing earlier. At the time they last had voluntary departure, in May of 1974, Noel v. Green was already in litigation. As is indicated in

BEST COPY AVAILABLE

Exhibit B, the issues of fact and law involved in Noel v. Green was similar to these plaintiffs' case. The legal issues involved in Noel v. Green, far from being frivolous, were substantial, so substantial that the Government agreed to stay action on all such cases joining the litigation until the matter was finally disposed of by the Supreme Court. Just as the named plaintiffs in Noel v. Green had a right to judicial review, these plaintiffs too had a right to such review. That they had a right to judicial review is acknowledged by the Government in Exhibit B. However, had the plaintiffs left the country on May 20, 1974, under the last grant of voluntary departure, they would necessarily have had to forfeit that right to judicial review.

14. The plaintiffs thus were in a situation where they could leave the country under voluntary departure and forfeit their right to judicial review, or remain in the country and seek judicial review under the issues raised in Noel v. Green. They were justified in remaining because they had a right to judicial review and because the issues were substantial. As they were justified in not departing, this failure to depart should not now be set forth as a reason for declining to restore voluntary departure.

15. On information and belief, all or almost all aliens similarly situated to the aliens in Noel v. Green, who joined in that action by filing complaints, were continued in voluntary departure status or had voluntary departure restored. An exception now appears to be carved out

in this case because these aliens did not formally file their complaint in the District Court until after their time for voluntary departure had expired and they had been ordered to surrender. In our view, such a distinction is unreasonable. The litigation in Noel v. Green had been commenced before these plaintiffs had been given voluntary departure in May of 1974 and was in progress while they had voluntary departure. It was commenced as a class action, although it was never ordered by the Court as being such. But even though the class action aspect of Noel v. Green was never passed on, there is no doubt that any rule of law which may have emerged from Noel v. Green would have governed these plaintiffs whose case is conceded by the Government to involve similar issues of fact and law. Under these circumstances, it is irrational to premise the determination on the date they formally joined the Noel v. Green litigation by filing their District Court complaint. It is also irrational to punish these plaintiffs for seeking judicial review of a matter involving substantial issues, which is what the defendant District Director here is actually doing.

16. The fact that the Noel v. Green litigation ended adversely to the plaintiffs is of no moment in this case. What is important here is that there was jurisdiction for that action and that the issues raised were substantial. Both of these matters are surely conceded by the Government. Moreover, when that litigation was ended, these plaintiffs were willing and anxious to leave in the status of voluntary departure, a status they had while Noel v. Green was in progress.

17. The plaintiffs will suffer irreparable harm in the event a temporary restraining order and preliminary injunction is not granted. As we have indicated, the plaintiffs, by virtue of the labor certification issued to CECILIA BRIONES, and by virtue of the fact that they have a United States citizen child, are prima facie eligible under our laws to receive immigration visas. Because they submitted their visa applications several years ago, their cases are now current, and they can be immediately granted visas despite the long waiting lists for natives of the Western Hemisphere. They will be ineligible for the granting of visas, however, should they be forcibly deported from the United States. Thus the issue of whether or not voluntary departure should be restored is of vital importance to these plaintiffs and to their citizen daughter. On the other hand, granting of the temporary restraining order and of the preliminary injunction pending determination of this declaratory judgment action on its merits, will cause no hardship to the Government.

18. No request for the specific relief requested here on behalf of these plaintiffs has previously been made to any Court.

WHEREFORE, plaintiffs pray that this Court enter an order granting a preliminary injunction restraining the defendant, MAURICE F. KILEY, from deporting the plaintiffs from the United States until this declaratory judgment is determined on the merits.

STANLEY B. WALLENSTEIN

Sworn to before me this
10th day of March 1976.

William M. Parente

WILLIAM M. PARENTE
Notary Public, State of New York
No. 24-4524473
Qualified in Kings County
Commission Expires March 30, 1978

EXHIBIT B TO PLAINTIFFS' AFFIDAVIT OF MARCH 10, 1976 **A-33**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANGEL and CELIA ERUSTINA NORIEGA, GASTON and CECILIA BRIONES and VICTOR HUGO and MARIANA RUBIO, Plaintiffs, -against- MAURICE F. KILEY, Acting New York District Director of the U.S. Immigration and Naturalization Service. Defendant.	STIPULATION OF SETTLEMENT AND DISMISSAL 74 CIV. _____

WHEREAS the facts and legal issues in the above-captioned matter are similar to the facts and legal issues in:

RODOLPHE NOEL, et.al,vs. LEONARD CHAPMAN, Civil Action No. 74 Civ. 1447 now on appeal to the United States Court of Appeals, Second Circuit.

IT IS HEREBY STIPULATED AND AGREED between the undersigned, as Attorneys for the respective parties herein, that

(1) The above-captioned matter now pending before this Court will be governed by the determination on appeal by the NOEL case.

(2) That pending said determination on appeal, the deportation of the plaintiffs in this matter shall be stayed by the Immigration and Naturalization Service.

(3) That the above entitled action be and the same is hereby dismissed.

Milton Alan Kramer
POLLACK & KRAMER
Attorneys for Plaintiffs

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendant.

By: _____
LYDIA E. MORGAN
Assistant United States Attorney

_____July, 1974.

EXHIBIT B

EXHIBIT E TO PLAINTIFFS' AFFIDAVIT

A-34

Form approved
OMB No. 43-R402.2

United States Department of Justice
Immigration and Naturalization Service

Fee Stamp

APPLICATION FOR STAY OF DEPORTATION

SUBMIT IN DUPLICATE

Read instructions on reverse before filling out application

APPLICATION FOR RESTORATION OF VOLUNTARY DEPARTURE

File No.
A18 695 848 & A19 457 561

Date
February 2, 1976

1. Name (Family Name in Capital letters) (First Name) (Middle Name)
BRIONES, Gaston & Cecilia

2. Present Address (Apt. No.) (Number and Street) (Town or City) (State) (Zip Code)
143-33 Sanford Avenue, Flushing, New York

3. Country of Citizenship
CHILE

4. Date to which passport is valid (Attach passport)

5. Country to which deportation has been ordered
CHILE

6. Date to which stay of deportation is requested

7. Reasons for requesting stay of deportation:

Respondents are the parents of a United States citizen child, Paola born June 4,1973. Respondents have a priority date of October 10,1972. At a deportation hearing held May 6,1974, the respondents were granted the privilege of voluntary departure. They both failed to depart as required due to the institution of litigation which required them to exhaust their administrative remedies before they could start such action ie.,apply for a Stay of Deportation. In conjunction with this motion all litigation re NOEL in the Federal Court is hereby withdrawn. The husband is the owner of a restaurant, CHACARERO, and needs 30 days to sell the same.

8. I certify that all the statements I have made in this application are true and correct to the best of my knowledge and belief.

Victor Daly Reames — New York City — February 2, 1976
(Signature of Applicant) (Dated at) (Date)

9. SIGNATURE OF PERSON PREPARING FORM, IF OTHER THAN APPLICANT

I declare that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge.

Victor Daly Reames — 225 Broadway, NY 10007 — Feb. 2, 1976
(Signature) (Address) (Date)

APPLICANT: DO NOT WRITE BELOW THIS LINE

Stay denied/granted until _____ by _____

Form I 246
(Rev. 4-10-72)N

EXHIBIT F TO PLAINTIFFS' AFFIDAVIT

A-35

20 West Broadway
New York, New York 10007

A18 695 848 DB/80
A19 457 561

February 12, 1976

Gaston BRIONES and
Cecilia DEGOLLADO de BRIONES
143-33 Sanford Avenue
Flushing, New York

Dear Mr. & Mrs. Briones:

This is in reference to the Application for a Stay of Deportation and request for restoration of voluntary departure filed on your behalf on February 4, 1976.

Please be advised that a stay of deportation has been granted to you until March 10, 1976. However your request for restoration of voluntary departure has been denied as you did not avail yourselves of that privilege when it was previously granted.

You will be further advised as to the details of this Service's plans to effect your deportation.

Sincerely,

Maurice F. Kiley

MAURICE F. KILEY
DISTRICT DIRECTOR
NEW YORK DISTRICT

CC: Pollack & Kramer, Esq.
225 Broadway
New York, N.Y. 10007

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

GASTON BRIONES and CECILIA BRIONES,

Appellants,

- against -

MAURICE F. KILEY,

Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the **15th** *day of* **Sept.** *19* **76** *at* **1 St. Andrews Plaza New York, N.Y.**

deponent served the annexed ~~Appendix~~ *upon* **Robert Fiske, Jr., Attention: Special Assistant, Mary P. Maguire**

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **15th** *day of* **September** *19* **76**

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Reuben Shearer

Reuben Shearer